United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

921

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,954

VINCENT E. SCOTT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Appeal From the United States District Court

For the District of Columbia

James L. McHugh, Jr.
John G. Kester
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

John L. Ingoldsby, Jr.
World Center Building
Washington, D. C. 20006
Attorneys for Appellant

QUESTIONS PRESENTED

1. Whether, on the facts presented by this case, the continuation of the trial of Appellant before the same jury after a co-defendant changed his plea from not guilty to guilty was a denial of Appellant's right to due process of law.

2. Whether the trial court considered matters at Appellant's sentencing which were inappropriate and inflammatory, thus constituting a denial of Appellant's right to due process of law.

3. Whether the trial court's admitted preference that the Appellant, who maintained his innocence, confess guilt in open court, violated Appellant's Fifth Amendment right not to be forced to condemn himself.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,954

VINCENT E. SCOTT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was charged with violation of 22 D. C. Code §2901 by an indictment filed in the United States District Court for the District of Columbia on November 1, 1965. He was tried

before a jury on February 16 - 20, 1967 and found guilty. On April 7, 1967, he was sentenced to imprisonment for a period of not less than five years nor more than fifteen years.

Notice of appeal was filed on April 13, 1967. The jurisdiction of this Court is based upon 28 U.S.C., §1291 (1964).

STATEMENT OF THE CASE

1. Background

Appellant, Vincent E. Scott, then 18 years old, along with Billy C. Alston, was charged with violation of 22 D. C. Code §2901, robbery, by an indictment filed in the United States District Court for the District of Columbia on November 1, 1965. Both defendants entered a plea of not guilty and were released on bond.

Prior to trial, counsel for Appellant moved that the two defendants be tried separately, on the ground that Appellant would be prejudiced by the attribution to him of evidence against the defendant Alston. This motion was denied.

2. The Trial

At trial the government presented three witnesses: the complaining witness and the two arresting officers. The

complainant stated that on October 19, 1965, at about 5:30 a.m., he was sitting in his car on 15th Place, S. E., Washington, D. C., waiting to pick up a rider. He testified that two men pulled him from his car, took his watch and billfold, and escaped across the street. He stopped a passing police car and reported the incident. The two police officers who were in the car then ordered the defendants, Scott and Alston, who were on the other side of the street, to come over to the police car. They did so and were identified by the victim as the men who had accosted him. The police searched both men and found the watch and billfold in Alston's possession. Subsequently, the police found across the street a toy pistol which the victim testified had been pointed at him by the Appellant. The police officers testified to substantially the same facts.

At the commencement of the second day of the joint trial the co-defendant Alston withdrew his plea of not guilty and entered a plea of guilty to the charge of robbery. In the course of questioning Alston the trial court elicited a statement from him which implicated Appellant as a co-perpetrator of the robbery. The trial judge accepted Alston's plea. Counsel for Appellant immediately moved for a mistrial on the grounds

that having heard Alston's story the Court would be prejudiced against the Appellant. This motion was denied.

Thereafter, Appellant testified on his own behalf and insisted that while he had been with Alston when the latter saw the victim in his car and when Alston proposed robbing him, he did not participate. After hearing the evidence, the jury returned a verdict of guilty.

After the second day of trial, the Court revoked Appellant's $3,000 bond, reset it at $10,000 and ordered him committed. 1/

3. The Sentencing

Appellant appeared before the trial judge for sentencing on April 7, 1967. After the hearing had begun, Appellant, who continued to maintain his innocence, mentioned a letter he had received from his counsel. The Court said:

"Yes, let me have the letter. Pass it up."

(Sentence Transcript 11; hereafter cited as "S.Tr.").

The Court then identified it as a letter to Appellant written by his counsel. Counsel made objection that the letter was a privileged communication, to which the Court made the following reply:

1/ Appellant's Application for Bail Pending Appeal was granted by an order of this Court issued July 7, 1967.

THE COURT: I don't care whether it is privileged or not. Do you want me to read it (defendant)?

DEFENDANT SCOTT: Yes, sir.

THE COURT: Do you waive any question of privilege?

DEFENDANT: I beg your pardon.

THE COURT: Do you waive any question of privilege between attorney and client in this case?

DEFENDANT SCOTT: I want it on my transcript.

THE COURT: You want it in the record?

DEFENDANT SCOTT: Yes. (S.Tr. 13)

The letter to Appellant from his counsel, read in part as follows:

Dear Vincent:

* * *

I then went to speak to Judge Sirica's law clerk. This was a most interesting conversation....

He then said something which I promised to communicate to you right away, that was that in his opinion there was only one way to get a light sentence from Judge Sirica and that was to confess that you did the robbery, to apologize four or five times and to say that you were willing to turn over a new leaf. I told the clerk that you had maintained your innocence from the beginning, that you had also told the probation officer that you were innocent. He said that doesn't matter,

> if he comes here and says he did it and that he was sorry, the judge will give him a very light sentence. If you or he say anything else the judge will probably throw the book at you. The clerk also said that you should seriously consider such a confession, that you did not have very strong grounds for appeal. Therefore, I am passing this along to you since I do not think we have very strohg grounds for appeal. As I told you at our last meeting, there are a few grounds for appeal we could try, but nothing which would show clearly that the judge's prejudice influenced the jury. Therefore, I think you ought to consider seriously following the clerk's suggestion and admitting to guilt before the judge in order to get a light sentence.... (S. Tr. 14-15).

The Court then called its law clerk to the stand to testify with regard to the conversation he had with Appellant's counsel. The law clerk's testimony disclosed that the letter was substantially accurate in reporting the essence of their conversation. The law clerk stated:

> [I]t is in the transcript in many cases, that you [the trial judge] are waiting fot the day when someone would come into this court and say that they were guilty at sentence, that when a jury finds a man guilty and it is clear a man is guilty they only do themselves a disservice by maintaining they are innocent, and consequently it has always been my opinion you view sentencing differently when someone admits guilt rather than maintaining innocence. (S. Tr. 17-18).

In response to this testimony the Court made the following statement:

> THE COURT: I have made the remark several times that I would hope and it is a strange thing to me that in practically every case I sentenced people in I get the same song and dance, they are innocent. I don't think a defendant is innocent in every case in which the jury convicts a man, it is impossible. It might be probable, but impossible that they could be innocent in every case.
>
> I have said more than one time, I have said it in open court, it is a strange thing to me that a defendant who comes up after getting the benefit of good representation, trial before jury, the evidence being overwhelming as it is in this case, I hope sometime I hear some defendant say, "Judge, I am sorry, I am sorry for what I did." That is what I have in mind. (S. Tr. 18-19).

At several other times during the sentencing hearing the Court stated its displeasure with Appellant's insistence on maintaining his innocence:

> Now the Court didn't believe your [Appellant's] story on the stand, the Court believes you deliberately lied in this case. If you had pleaded guilty to this offense I might have been more lenient. (S.Tr 5).
>
> And he [Appellant] got on the stand and he lied about it. The other boy at least pleaded guilty after he heard the government's evidence - threw the sponge in, so to speak - because he knew he didn't have a chance. (S.Tr. 7).
>
> Now in view of his [Appellant's] attitude and in view of the fact that he lied on the stand, in the Court's opinion, the jury didn't believe him, I didn't believe him; the evidence in this case as I said is overwhelming. (S.Tr 10).

The defendant Alston was also sentenced at the same time as Appellant. He attempted during the hearing to recant his guilty plea on the grounds that he was innocent, had been confused at trial and had entered the plea in the hope of obtaining a lesser sentence. The Court stated that it had planned to be lenient with him but that in view of the fact that he too was "deliberately lying" he would receive the same sentence as Appellant. (S.Tr. 29).

The Court then sentenced both defendants to imprisonment for not less than five nor more than fifteen years, with the recommendation that they be confined in institutions for young offenders.

STATUTES INVOLVED

Title 22, Section 22-2901, D. C. Code provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Amendment V, United States Constitution, provides in part:

> No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, [or] liberty... without due process of law.

STATEMENT OF POINTS

Appellant relies upon the following points:

1. The district court erred in allowing Appellant's trial to continue before the same jury after a co-defendant withdrew his plea of not guilty and entered a plea of guilty.

With respect to Point 1, Appellant desires the court to read the following pages of the reporter's transcript of trial: Tr. 81 - 83, inclusive.

2. The district court erred in sentencing Appellant on the basis of a hearing in which the court considered inappropriate and inflamatory matters.

With respect to Point 2, Appellant desires the court to read the following pages of the reporter's transcript of the sentencing: S.Tr 1 - 35, inclusive.

3. The district court erred in basing the severity of Appellant's sentence on Appellant's continued insistence of his innocence.

With respect to Point 3, Appellant desires the court to read the following pages of the reporter's transcript of the sentencing: S.Tr. 5 - 7, 10, 11 - 19, 29 and 34, inclusive.

SUMMARY OF ARGUMENT

I.

In this case the trial judge was under a continuing duty to grant a severance at such time as prejudice to Appellant might develop as a result of his joint trial with a co-defendant. Such prejudice developed when the co-defendant pled guilty after one day of trial. This prejudice resulted from the inevitability of the jurors concluding that he was withdrawn from the case because of a guilty plea. The fact that a plea had been entered could not have been introduced as evidence against Appellant. However, since no cautionary instruction would have been possible or appropriate, there was no way in which Appellant could have been protected from the jurors consideration of this improper factor other than a new trial before a different jury.

II.

An appellate court has the power to review the constitutional validity of a sentencing procedure. Appellant's

sentencing was dominated by inappropriate and inflamatory matters, including the disclosure of a privileged communication between attorney and client, the publication of a letter which raised questions concerning the propriety of the judge's manner of sentencing, a statement by the judge in defense of his sentencing approach and the placing of undue emphasis on the trial court's belief that Appellant had lied in claiming his innocence. Under these circumstances, Appellant was denied the fundamentally fair sentencing procedure to which he is entitled under the due process clause of the Constitution.

III.

The Fifth Amendment of the Constitution guarantees an accused the right not to plead guilty. This right continues after conviction in the trial court. To hold otherwise would dilute an accused's chances on appeal and would subject him to the possibility of self incrimination of perjury. Therefore, for a court to impose a greater punishment on an accused for maintaining his innocence denies him rights secured under the Fifth Amendment.

I.

Appellant's Trial Was Fundamentally Unfair Because He Was Tried Before a Jury That Knew That the Co-Defendant Had Pled Guilty

Prior to trial the District Court denied Appellant's motion for separate trials. However, as the Supreme Court stated in Schaffer v. United States, 362 U.S. 511, 516 (1960), even though joinder may be proper initially, "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear."

Prejudice under the facts of this case is inevitable. On the opening day of trial the jury was confronted by a prosecution against the two co-defendants, Appellant and Alston. At the first day of trial the jury heard testimony that Scott and Alston, acting in concert, had robbed a man while he sat in his car in the early morning. Both defendants were positively identified by the victim and the police officers. Defendant Alston was identified as having been caught with the victim's watch and billfold.

At the commencement of the second day of trial Alston withdrew his plea of not guilty and entered a plea of guilty. The jury was then returned to the courtroom and given the following instruction by the trial judge:

> Now the case will proceed and there is only one defendant [who] will be before you for consideration at the proper time under the instructions on the law and under the evidence in this case. That will be the case of the United States v. Vincent E. Scott. (Tr. 82-83).

It is impossible to know exactly how the jurors interpreted the absence of Alston on the second day of trial. It is reasonable to assume, however, that some or all of the jurors surmised that he had pled guilty. The liklihood that the jurors reached this conclusion is buttressed by the fact that no explanation was offered for Alston's disappearance. Surely they would have expected one had Alston become incapacitated and was unable to continue at trial. It is most likely, therefore, that at least some of the jurors strongly suspected that Appellant's co-defendant had withdrawn his not guilty plea.

Since the basic issue of fact for the jury was the resolution of conflicting testimony, the suspicions that the jurors probably had regarding Alston's disappearance are quite

important. The evidence that Appellant and Alston were together on the morning of the robbery was not contradicted. In fact, even Appellant admitted that he was with Alston until just moments before the alleged offense. However, Appellant maintained that he did not participate in the offense. If the jury suspected that Alston pled guilty it could very naturally assume that Alston had implicated Appellant, particularly since Appellant did not call Alston as a witness in his behalf. While theoretically the government might have called Alston as a witness to further implicate Appellant, it did not do so. Moreover, it is clear that the confession by Alston could not have been introduced as evidence against Appellant. Kramer v. United States, 115 U.S. App. D. C. 50, 317 F.2d 114 (1963). The United States cannot, therefore, rely upon his unspoken or inferred testimony.

This situation could have been corrected only by the declaration of a mistrial and the institution of a new trial before a new jury. No cautionary instructions to the jury in this case could have prevented prejudice and none were requested or attempted. Thus, this case differs substantially from those cases holding that the question of severance is within

the sound discretion of the trial judge. Eg., Dykes v. United States, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962), certiorari denied 374 U.S. 837 (1963); United States v. Kramer, 355 F.2d 891, 899 (7th Cir. 1966), vacated and remanded in part on other grounds, (384 U.S. 100 (1966)). Such cases generally involve the introduction at trial of a confession by a co-defendant where cautionary instructions would adequately protect the other defendant.

In Marshall v. United States, 360 U.S. 310, 312-313 (1959), the Supreme Court stated that improper matters which reach a jury indirectly may be more prejudicial than if they had been introduced by the prosecution. The court said:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence. Cf. Michelson v. United States, 335 U.S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures.

In determining whether trial before the same jury was prejudicial or not, whether or not there may have been sufficient evidence independent of the jurors' suspicions about Alston is not relevant. In Barton v. United States, 263 F.2d 894 (5th Cir. 1959), the court rejected the government's contention that a separate jury would have made no difference because of the awesome array of evidence against the defendant. The court stated that

the fact that the conviction could have been supported apart from the error made no difference because the court could not substitute itself for the jury, whose duty alone it was to pass upon the defendant's guilt or innocence. See Mesarosh v. United States, 352 U.S. 1, 12 (1956).

II.

The Sentence Imposed On Appellant Is Constitutionally Defective In That It Was the Product of a Hearing Dominated By The Consideration of Inappropriate and Inflammatory Matter Which Prejudiced Appellant's Interests

Appellant is not asking that this Court review his sentence. It is recognized that considerable authority weighs against such review by an appellate tribunal. 2/ Eg., Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299; United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952). However, it is established that an appellate court has the power to review the legality of a sentence and the sentencing procedure. Coleman v. United States, 123 U.S. App. D.C. 103, 357 F.2d 563 (1965); Frady v. United States, 121 U.S. App. D.C. 78, 348 F.2d 84, certiorari denied, 382 U.S. 909 (1965); Leach v. United States, 118 U.S. App. D.C. 197, 334 F.2d 945 (1964).

2/ Appellant would contend, however, that a court of appeals does have such power under 28 U.S.C. §2106.

As the Court said in Coleman: "broad as his discretion may be a sentencing judge must always conform with the law governing the sentencing function." 357 F.2d at 570. It is also established that sentencing procedure is subject to the scrutiny of the due process requirements of the United States Constitution. Townsend v. Burke, 334 U.S. 736 (1948).

Appellant's sentencing was dominated by the unfortunate disclosure of a letter written to Appellant by his attorney. Counsel sought to prevent publication of the letter by asserting that the letter was a privileged communication. It does not appear from the exchange between the court and the Appellant, that Appellant had any idea what the attorney-client privilege was. (S.Tr. 13). Further, absent the advice of counsel on this matter, it does not appear that he fully understood the results that might stem from the disclosure of this record in open court.

This letter reported a conversation between the Appellant's attorney and the trial judge's law clerk in which the law clerk purportedly stated that the only way to avoid a severe sentence from the trial judge was to admit guilt at the sentencing. Disclosure of this letter led the judge to take the

unusual step of placing his law clerk under oath to testify as to his conversation with Appellant's attorney. It further led to the trial judge's stating in open court that he had not told his law clerk or anyone else that he"would throw the book at him or anyone else if he didn't come up to confess." (S.Tr. 19).

The effect of the disclosure of this inflammatory letter from attorney to client must also be measured in light of the court's several statements charging that Appellant had lied about his guilt. While trial courts have broad discretion as to what may be considered for purposes of imposing sentence, the record here discloses that the court placed considerable emphasis upon its belief that Appellant committed perjury at trial by maintaining his innocence under oath. While perhaps such a consideration might never be totally erased from the mind of a sentencing judge, it is axiomatic that perjury is a crime for which Appellant could only be punished on the basis of trial and conviction under basic constitutional safeguards. 3/ See DeJonge v. Oregon, 299 U.S. 353, 362 (1937). It is not punishable summarily, or in a fashion which prevents appellate review.

3/ See, The Influence of Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 209-217 (1956).

The Court's admitted concern with whether the Appellant was speaking truthfully in maintaining his innocence is inextricably involved with the subsequent disclosure of the letter, raising as it did the question of whether an admission of guilt would reduce the risk of a heavy sentence being imposed.

It is not necessary to dwell upon the bizarre nature of this sentencing hearing. The record of the hearing, parts of which are set out in the Statement of the Case, shows that a substantial portion of the proceeding was devoted not to the sentencing of the two defendants, but rather to the trial judge's exploration in open court of matters discussed in a personal letter Appellant had received from his attorney. Then, when his own inquiry developed allegations which cast grave doubt on the standards normally applied by him in passing sentence, the trial judge himself testified as to his standards and, without denying the substance of the allegations, then himself ruled that his standard of extra severity for the defendant who maintained innocence was proper. In the course of its exploration of his attorney's advice to Appellant, the court considered extraneous and prejudicial matters and violated Appellant's

attorney-client privilege. Under all these circumstances, the trial court was unable to accord to Appellant the fundamentally fair, impartial and objective sentencing to which he is entitled under the Constitution's guarantee of due process of law.

III.

The Imposition of a Greater Sentence on a Defendant Because He Maintains His Innocence Punishes Him for Exercising His Right Not To Plead Guilty Under the Fifth Amendment

The Fifth Amendment forbids the government from forcing any person to be a witness against himself. Due process further forbids the conviction of any person on the basis of a coerced guilty plea. See, e.g., Pennsylvania ex rel Herman v. Claudy, 350 U.S. 116 (1956). It has recently been reaffirmed that the Fifth Amendment includes the "right not to plead guilty." United States v. Jackson, 36 U.S.L. Week 4277, 4281 (Apr. 8, 1968).

Even after conviction a defendant is entitled to maintain his innocence. Were he at that point to forswear his denials at trial, he would not only run the practical risk of causing appellate judges to regard as harmless those errors

in his trial which might otherwise have bulked as substantial. He would also be confessing to the offense of perjury, for which he could be separately indicted, tried, convicted and sentenced. See, e.g., United States v. Williams, 341 U.S. 58 (1951).

In these circumstances, for a court to impose greater punishment on a defendant for maintaining his innocence denies him the rights guaranteed by the Fifth Amendment. United States v. Jackson, supra.

CONCLUSION

Appellant was tried before a jury that realized that his co-defendant, with whom he admitted being right up to the moment of the crime, had entered a plea of guilty. Since the credibility of the conflicting witness was the basic issue in this case, the jurors' probable suspicions regarding the co-defendant's plea substantially impaired Appellant's right to a fair trial.

Appellant's sentencing hearing was dominated by inappropriate and inflammatory matters which rendered it impossible for Appellant to be sentenced in accord with the dictates of

due process. Further, it appears that Appellant received a greater sentence partially because he insisted on maintaining his innocence and thus was punished for exercising his right under the Fifth Amendment not to plead guilty.

The conviction and sentence should be reversed and the case remanded for a new trial, or in the alternative, for resentencing.

Respectfully submitted,

James L. McHugh, Jr.
John G. Kester
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

John L. Ingoldsby, Jr.
World Center Building
Washington, D. C. 20006
Attorneys for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,954

VINCENT E. SCOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JAMES E. KELLEY, JR.,
Assistant United States Attorneys.

Cr. No. 1200-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Was appellant prejudiced by the trial court's refusal to grant him a mistrial because his co-defendant, Alston, pled guilty out of the presence of the jury when (1) the jury was directed not to speculate about Alston's subsequent absence from the trial, (2) there were other explanations for his absence other than that he might have pled guilty and (3) appellant's theory of the case was that only Alston was guilty of the robbery?

2. Was there reversible error in the sentencing proceeding when (1) disclosure of the March 13, 1967 letter to appellant from his trial attorney did not violate the attorney-client privilege, (2) the judge had the discretionary power to weigh a determination that appellant had deliberately lied against him in arriving at an appropriate sentence and (3) this Court does not review the length of sentences and should not attempt the impossible task of trying to control factors which the trial judge may consider in imposing sentence or to control what relative weight to attach to those factors which are considered?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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VINCENT E. SCOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a one-count indictment filed November 1, 1965, the Grand Jury charged appellant and Billy C. Alston with robbing William D. Bays (22 D.C. Code § 2901). Trial before Judge Sirica began on February 16, 1967, and the jury heard the testimony of Mr. Bays and Officer William H. Harris and the direct testimony of Detective Edmund F. Goodall. At the beginning of the second day of trial, February 17, Alston entered a plea of guilty to the indictment out of the presence of the jury. When trial resumed with appellant as the only defendant,

Judge Sirica told the jury that "the case will proceed and there is only one defendant [who] will be before you for consideration at the proper time under the instructions on the law and under the evidence in this case. That will be the case of the United States [versus] Vincent E. Scott." (Tr. 82-83.) In his charge on February 20 at the conclusion of all the evidence, the trial court stated:

> . . . [A]s you know the defendant along with his co-defendant, who started out as a co-defendant, were charged in a one-count indictment of the crime of robbery. Let me caution you about this. You are not to be concerned in anyway whatsoever regarding the case against the defendant Alston. His case is not before this jury with the exception insofar as what the evidence might show as the participation of these defendants in the case—the alleged robbery—and will be for you to determine what the facts are, but you must not conjecture, speculate, guess or surmise why the other defendant is not before you at this time. (Tr. 156.)

The verdict was guilty as indicted. On April 7, 1967, appellant and Alston were each sentenced to a five to 15 year term of imprisonment with a recommendation for confinement in an institution for youthful offenders (S. Tr. 30, 32-34).[1]

Testimony at Trial and Alston's Plea of Guilty

D.C. Transit bus driver Bays was the Government's first witness at trial. On his way to work he drove to the vicinity of 3144 15th Place, Southeast, on the morning of October 19, 1965 to pick up a rider. He was sitting in his parked car with his back to the driver's door waiting for his rider and listening to the radio at around 5:25 a.m. when he observed the light come on inside the car. (Tr. 4-6.) Turning, he saw two men

[1] "Tr." is the transcript of the February 16-20, 1967 trial. "S.Tr." is that of the April 7, 1967 sentencing proceeding.

standing beside the car. One, identified as Alston, informed him that "we want your money" and, grabbing him by the arm, pulled him from the car. The other, identified as appellant, pointed a silver colored gun at the witness. Alston removed his watch and then turned him around and relieved him of his billfold. (Tr. 6-9, 11.) The shorter robber, appellant, picked up a cash box lying on the rear seat of the car. When he saw another car approaching, however, appellant put the box back down, and one of the two said, "Let's go." They then walked across the road. (Tr. 11, 19-21, 36-37.)

Bays began to follow them until appellant, pointing the gun, ordered him back into the car. He got back in, slid across the seat and got out on the passenger side, losing sight of the pair only during this sliding. (Tr. 12, 22, 39.) He was so occupied with watching the two after re-emerging from his auto that he was almost hit by the car which had been approaching, as he walked out into the street (Tr. 12, 25). In that car were Detective Goodall and Officer Harris. Apparently after being briefly apprised of what had happened, Goodall ordered the two, who were still in sight, to come back, which they did (Tr. 12). When so ordered they had reached the drive inside the street curb leading into an alley but were not yet inside the alley. The alley was some 200 feet from Bays' car. (Tr. 12, 25-27.) He saw the police recover his wallet and watch from Alston. He also identified Government's Exhibit No. 1 for identification as resembling the gun which appellant pointed at him. He saw the police recover that item from the grass near the alley at the point farthest away from him reached by the robbers. (Tr. 12-14.)

Bays explained that a street light near his car and another at the corner of the aforementioned alley afforded enough light to read by and that the former was shining on the two as they robbed him (Tr. 14, 28). Able to see the face of the man he identified as appellant during the robbery, Bays said that man was about his height, wore a narrow brim hat and had a two to three

inch scar on the side of his face (Tr. 38). There were no other persons in the vicinity at the time of the robbery (Tr. 14).

Officer Harris, Eleventh Precinct, testified that he and Detective Goodall were cruising in plainclothes when they observed appellant and Alston at Stanton Terrace and Bruce Place a few minutes before 5:30 a.m., October 19, 1965. Goodall had a brief conversation with the two. (Tr. 47-48.) Minutes later on 15th Place, some two and a half blocks away, a man who turned out to be Bays jumped out in front of their cruiser "yelling that he had just been robbed and he pointed in the direction in which the alleged robbers were and we recognized them as the men we had just had a conversation with a little while back" (Tr. 48-50). Bays identified them, appellant and Alston, as the robbers, they were arrested and Harris recovered Bays' wallet and watch from Alston's person. The witness identified Government's Exhibit No. 1 as similar to the gun recovered by Goodall on the scene. (Tr. 50-53.)

Detective Goodall also testified to seeing appellant and Alston a few minutes prior to seeing them again in the 3100 block of Bruce Place. There Bays jumped out from behind a parked vehicle, exclaimed that he had been robbed and pointed at appellant and Alston who were together in front of 3157 15th Place about to enter an alley. At Goodall's summons the two approached the cruiser. (Tr. 69-72.) Either before or after this summons he observed appellant place some object in a tree box space (Tr. 72, 89-90). From that space, about 10 or 15 feet from the alley, Goodall later recovered a silver colored toy pistol and identified Government Exhibit No. 1 as that pistol (Tr. 73, 90-91). Bays' wallet and watch were taken from Alston (Tr. 72A).[2]

Alston's guilty plea followed Goodall's testimony on direct. Before accepting the plea Judge Sirica posed a series of questions to Alston and had him relate what had

[2] There are two pages in the first volume of transcript numbered 72. The second we have designated "72A."

happened. He understood his right to a speedy jury trial with counsel and that he would get no trial if he pled guilty, Alston said. He understood the charge and his plea was not induced by promises, threats, coercion or pressure. He was, he said, entering his plea voluntarily because he was guilty and for no other reason. (Tr. 72-74, 76.) He and appellant had met on the bus that morning at around 2:00 a.m. and had then repaired to a gas station to converse with some friends. Apparently on their way home from there, they happened to see Bays and robbed him. The idea was Alston's. Appellant had the gun. Alston admitted that Bays' depiction of the events of the robbery was accurate. (Tr. 77-79.) Judge Sirica then accepted Alston's plea (Tr. 81).[3]

After the Government had rested, appellant took the stand. After finishing work at about 12:30 or 12:45 that morning he met Alston on a bus. They went to a gas station and conversed with friends for some hours. (Tr. 108.) On their way home from the gas station they had a conversation with Goodall and Harris at Stanton Terrace and Bruce Place (Tr. 108, 127). Proceeding on, they entered 15th Place where Alston noticed a car parked adjacent to 3144 15th Place and said, "there is a man asleep in the car, lets rob him." Appellant, so he said, replied, "I don't want to rob anyone," and proceeded on down the right hand side of the street walking at a normal pace. (Tr. 108-09.) Until summoned by Detective Goodall he never once looked back to ascertain what, if anything, Alston might be doing. His back to the scene, he therefore saw no robbery. (Tr. 110, 129.) At the alley he turned right and had gotten some 200 to 300 feet into the alley when he heard Goodall call his name and Alston's. Retracing his steps at this, he came out of the alley and passed Alston on the way. (Tr. 110-11.) At the resultant confrontation Bays, claimed appel-

[3] Thereafter appellant's counsel moved for a new trial on the ground that after hearing Alston's version of what happened the court might be prejudiced against appellant. The motion was denied. (Tr. 82.)

lant, said he was sure about Alston as one of the robbers but "not too sure" about appellant as the other (Tr. 112). Appellant had never seen the toy pistol before the police showed it to him (Tr. 114).

In rebuttal Detective Goodall testified that Bays did not state at the scene that he was sure about Alston but not sure about appellant. Rather he identified appellant as the gunman and Alston as the one who grabbed him and seized his watch and billfold. When Goodall first saw them, Alston and appellant were walking side by side at the mouth of the alley. (Tr. 142, 146.)

The Sentencing of Appellant and Alston

At the sentencing on April 7, 1967, appellant's counsel, invited to speak before imposition of sentence, argued that no inference of perjury should be drawn against appellant because Alston's implication of appellant prior to his plea was motivated by ill-will inasmuch as Alston had just then learned that appellant's testimony was going to implicate him. His client, counsel said, had mantained his innocence from the beginning. (S.Tr. 2-3.) Appellant then stated that his testimony had been entirely truthful and further that Alston was now willing to tell what really happened (S. Tr. 4). Alston was then brought out and asked by the court to tell what happened. Nothing, he replied, adding that he was scared and had not known what to do when he entered his plea. The court told Alston that he did not believe him. Addressing appellant, Judge Sirica stated his belief that appellant deliberately lied on the stand. If he had pled guilty, the court might have been more lenient, he said, and added that he had no doubt about the guilt of the two defendants. (S.Tr. 5-7.)

Continuing, Judge Sirica stated factors which judges consider when sentencing a defendant convicted of a crime of violence: the rehabilitation of the defendant, punishment (which, in his view, was not a central consideration here), and the deterrent effect a substantial sen-

tence might have on others planning similar offenses (S. Tr. 8-9). In view of appellant's attitude and the fact that he lied, Judge Sirica indicated that the only thing he would do would be to recommend confinement in an institution for youthful offenders (S. Tr. 10).

Appellant then began to state the contents of a letter received from his counsel. Judge Sirica asked to see the letter and began to read it into the record.[4] During the

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[4] The letter, dated March 13, 1967, is part of the record on appeal and reads as follows:

Dear Vincent:

I met this morning with the Probation Officer who is doing your pre-sentencing report, Mr. Soden. We had a long talk and I found he has already contacted most of the people who are on our list. I think that the talk was helpful because it gave me a chance to explain to him that there was a real danger in this case of the Judge "throwing the book at you". He stated that he would have to "call it as he saw it", but that he customarily recommends Youth Correction in cases such as yours. When I left him he said he would call me if he needed anything further and I took a few more minutes to tell him again how important it was to have a good Report.

I then went to speak to Judge Sirica's Law Clerk. This was a most interesting conversation. The Law Clerk stated that it was a complete waste of time to attempt to talk to the Judge in chambers and that, in fact, if I did talk to him we would run the risk of getting him even angrier. He then said something which I promised to communicate to you right away—that was, that in his opinion there was only one way to get a light sentence from Judge Sirica, and that was to confess that you did the robbery, to apologize four or five times and to say that you were willing to turn over a new leaf.

I told the Clerk that you had maintained your innocence from the very beginning and that you had also told the Probation Officer that you were innocent. He said: "That doesn't matter. If he comes in here and says that he did it and that he was sorry the Judge will give him a very light sentence. If you or he say anything else, the Judge will probably 'throw the book at you' ".

The Clerk also said that you should seriously consider such a confession if we did not have very strong grounds for appeal. Therefore, I am passing this along to you since I do *not* think we have very strong grounds for appeal. As I told you at our last meeting, there are a few grounds of appeal we could try, but nothing which would show clearly that the Judge's prejudice influenced the jury. Therefore, I think you ought to con-

reading counsel objected on the ground of privileged communication. After ascertaining appellant's desire that the letter be made part of the record, the court completed reading it into the record. (S.Tr. 11-15.)

Mike Valder, the court's law clerk, called to the stand, stated that he had talked about sentencing with appellant's counsel. During that discussion he had stated his own indirectly acquired opinion that Judge Sirica viewed sentencing differently when a convicted defendant, instead of maintaining innocence, admitted his guilt. He and Judge Sirica had not discussed sentence in this case. (S.Tr. 16-18.) The court then commented that he found it strange that nearly all convicted defendants continue to say they are innocent at sentence and that he hoped some day to hear one express remorse for his misdeed. He added, however, that he had not told anyone that he would "throw the book" at a defendant who did not confess. (S.Tr. 18-19.)

Appellant then said that Alston knew that he had not robbed the man. The court agreed to give Alston another opportunity to tell about it. Alston then reiterated that fear had induced him to enter a plea. He figured that he would be placed on probation if he did not go on fighting

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sider seriously following the Clerk's suggestion and admitting to guilt before the Judge in order to get a light sentence. Why don't you think about this and I will come down and see you again at the jail as soon as I get the time.

I checked with the Book Store and found that they delayed for some reason or other in sending you the books I ordered. You should be receiving the books shortly.

Sincerely,

[Signature of appellant's trial counsel]

THE COURT: . . . Do you want me to read it (defendant)?
DEFENDANT SCOTT: Yes, sir.
THE COURT: Do you waive any question of privilege?
DEFENDANT: I beg your pardon.
THE COURT: Do you waive any question of privilege between attorney and client in this case?
DEFENDANT SCOTT: I want it on my transcript.
THE COURT: You want it in the record?
DEFENDANT SCOTT: Yes. (S.Tr. 13.)

the case. He did not commit the crime, he said, and neither did appellant. (S.Tr. 22-23.) The court inquired into what advice Alston's counsel had given him before the plea. Counsel replied that he had told his client that chances of acquittal were slim, that if he were guilty he should enter a plea, that he should not lie in court and that in all likelihood his sentence would be less severe if he entered a plea. Counsel used no threats, coercion or pressure. (S.Tr. 23-24.) The court then stated that he had changed his original decision to be lenient with Alston in view of his attitude and the court's belief that he was deliberately lying now while telling the truth at his plea (S.Tr. 29). Five to 15 year terms of imprisonment were then meted out to both Alston and appellant (S.Tr. 30-33).

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I.

The trial court properly denied appellant a mistrial after taking Alston's plea of guilty out of the presence

of the jury. Since the jurors were directed not to speculate about Alston's absence and there were other possible explanations for that absence other than that he might have pled guilty, we cannot agree that they settled on the speculation that he had pled guilty. In any event, since appellant's testimonial efforts were directed towards placing all the blame for the robbery on Alston, he could not have been prejudiced by a jury belief that Alston had pled guilty.

II.

Appellant's sentencing proceeding was without error. Disclosure of the March 13, 1967 letter to him from his trial counsel did not violate the attorney-client privilege because the letter did not contain any communications emanating from appellant previously unpublished or material leading to inferences as to the tenor of such communications. Judge Sirica had the discretionary power to weigh a determination that appellant had deliberately lied against him in arriving at an appropriate sentence because the judge could conclude that such lying manifests bad character and is an *indicium* of how long a period of incarceration may be necessary for rehabilitation. This Court does not review the length of a sentence within the legal limit unless cruel and unusual and should not attempt the impossible task of seeking to control factors which the trial judge may consider in imposing sentence or to control what relative weight to attach to those factors which are considered.

ARGUMENT

I. The trial court did not err in denying appellant's motion for a mistrial after Alston's plea of guilty.

(Tr. 81-82, 108-12, 129, 156)

Appellant contends that the trial court should have granted appellant a mistrial after Alston's plea because "[i]t is reasonable to assume . . . that some or all of the

jurors surmised that he had pled guilty" and could "very naturally" have assumed that "Alston had implicated [a]ppellant" (Appellant's Br. 13-14). These assumptions, appellant says, would have prejudiced him in the eyes of the jury.

At the outset we think that appellant has only a "plain error" claim here (Rule 52(b), Fed. R. Crim. P.) and must therefore demonstrate more than some prejudice to his cause. *E.g.*, *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 311, 364 F.2d 702, 704 (1966). Appellant's motion for a new trial after Alston's plea was predicated on the ground that Judge Sirica might have been prejudiced against appellant after Alston had implicated him (Tr. 82). That jury speculation about Alston might have affected the verdict is, of course, an entirely new ground and one not advanced below.

We cannot agree that the jurors would have indulged in speculation that Alston's absence after the first day of trial signified that he had pled guilty. First, they were instructed in no uncertain terms that they "must not conjecture, speculate, guess or surmise why the other defendant is not before you at this time" (Tr. 156). And this is not a case where the jurors would have had to perform an impossible feat of mental gymnastics in order to follow the court's directive. Compare *Bruton* v. *United States*, 36 U.S. Law Week 4447, decided May 20, 1968. Second, assuming that they did speculate on Alston's absence in violation of that directive, they were unlikely to have settled on the conclusion that Alston had pled guilty in view of other possible explanations for his absence: he might have jumped bond;[6] a mistrial might have been granted as to him; or the defendants might have been severed and trial continued with appellant alone for that reason.

In any event, a jury conclusion that Alston had pled guilty could not have prejudiced appellant because ap-

[6] In fact, Alston was on bond prior to his plea (Tr. 81), and his absence, as far as the jury was concerned, commenced at the beginning of the second day of trial.

pellant's theory of defense, as revealed by his testimony, was based upon the thinly veiled assertion that Alston alone was responsible for the robbery. As the two were walking in the 3100 block of 15th Place, appellant related, Alston spied the victim in his car and suggested, "lets rob him." Disclaiming an interest in doing that sort of thing, appellant continued walking down the street, impliedly no longer in Alston's company, without ever looking back to check what his companion might be doing. When he was summoned out of the alley by Goodall, Alston was behind him and thus closer to the scene of the robbery. Appellant also asserted that Bays had stated on the scene that he was sure that Alston was one of the robbers. (Tr. 108-12, 129.) Since appellant's efforts were obviously directed towards placing all the blame on Alston, in no way was his defense prejudiced by a jury belief that Alston had pled guilty. Rather such a plea was perfectly consistent with and partly corroborative of appellant's defense. Moreover, the Government's evidence did not place Alston and appellant in an equal posture as to guilt because the possession by Alston of Bay's watch and billfold made the case a great deal stronger against him and even gave appellant's own story a slender underpinning of plausibility. In our view, the jury would have had little tendency to conclude that since Alston was guilty, appellant must also be guilty.[7]

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[7] Appellant's thought that the jurors might have gone even further and surmised that Alston had implicated appellant seems to us a wholly unwarranted speculation on this record. Of course they had no knowledge that Alston had done so. Any jury speculation that since appellant did not call Alston as a witness his testimony would have been unfavorable to appellant would have been met and neutralized by a corresponding, opposite speculation that since the Government did not call him his testimony would have been unfavorable to its case.

II. There was no error in the sentencing proceeding, and, in any event, the trial court's decision to weigh his determination that appellant deliberately lied on the stand against appellant in imposing sentence should not be reviewed by this Court.

(S.Tr. 3-5, 7, 10, 13)

Appellant also contends that his sentence should be set aside because the disclosure of the March 13, 1967 letter to him from his trial counsel violated the attorney-client privilege and because the trial court considered in sentencing his belief that appellant had deliberately lied in denying his guilt. In this latter connection, appellant urges that he had a right at all times to maintain his innocence. In our view, there was no error in the sentencing proceeding.

Disclosure of the letter at the sentencing did not violate the attorney-client privilege. That privilege protects only against the disclosure of confidential information from the client:

> The modern justification of the privilege, namely, that of encouraging full disclosure by the client for the furtherance of the administration of justice, gives no foundation for extending the privilege beyond communications of the client or his agents to the lawyer or his clerk. McCormick, Evidence § 93 (1954) at 186.

Manifestly, the letter is not a communication from appellant to his attorney, and the only remaining question is whether it contains material construable as statements or admissions of appellant or which leads to inferences as to the tenor of such statements or admissions. The privilege is not designed to protect the attorney's freedom of expression. 8 Wigmore, Evidence § 2320 (McNaughten rev. 1961) at 628-29. We think that an examination of the letter shows that the only material which could possibly qualify under that standard is the following, which had already been disclosed by counsel to Judge Sirica's clerk anyway: "I told the Clerk that you had

maintained your innocence from the very beginning and that you had also told the Probation Officer that you were innocent." This the court knew in substance from listening to appellant at sentencing prior to the disclosure of the letter and no doubt also from reading the presentence report (S.Tr. 3-4). The letter did not contain any communications emanating from appellant previously unpublished or material leading to inferences as to the tenor of such communications and so was properly before the court. Moreover, appellant's statement that he wished to have the letter made part of his transcript was an unequivocal waiver of any privilege there was (S.Tr. 13).

The record does reflect that Judge Sirica did consider in determining severity of sentence that in his judgment appellant had deliberately lied on the stand (S.Tr. 5, 7, 10).* In our view, the court had the discretionary power to weigh a determination that appellant had lied against him in arriving at an appropriate sentence. Lying to the jury while under oath does manifest bad character and indicates that a more lengthy period of incarceration may be required for purposes of rehabilitation. At least as experienced judge in his discretion could so conclude.

Moreover, we do not think that the decision to weigh lying against appellant should be subject to this Court's review. *Williams* v. *United States*, 273 F.2d 469 (10th Cir. 1959), is directly in point. Convicted of detaining and secreting mail under 18 U.S.C. § 1703, Williams contended at sentencing that he had had no intention to steal and was not a thief. The judge replied that he had theretofore intended to place Williams on probation, "but because in his opinion defendant continued to be dishonest" (*id.* at 470), he sentenced him to 18 months im-

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* The jury found on the basis of all the evidence that appellant had lied. We think that the judge could also consider that his friend Alston had implicated him before pleading guilty. And the content of appellant's testimony was certainly not such as to inspire confidence in its veracity. The finding as to deliberate lying seems clearly justified.

prisonment. While recognizing that a denial of probation because Williams continued to assert his innocence might be severe, the Court of Appeals concluded that this was a matter entirely within the discretion of the trial court and subject to the rule that a federal appellate court will not review the length of a sentence within the legal limit unless it is cruel and unusual.[9]

While a sentence may be set aside in this jurisdiction when a judge does not avail himself of facilities which will aid his sentencing determination such as a presentence report[10] or, where appropriate, a mental examination,[11] this Court and no other federal appellate court, to our knowledge, has attempted the impossible task of seeking to control factors which the sentencing judge may consider in determining appropriate sentence or to control what relative weight to attach to those factors which are considered.[12]

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[9] *E.g.*, *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Jones* v. *United States*, 117 U.S. App. D.C. 169, 171-72, 327 F.2d 867, 869-70 (*en banc* 1963).

[10] *Peters* v. *United States*, 113 U.S. App. D.C. 236, 307 F.2d 193 (1962).

[11] *Leach* v. *United States*, 118 U.S. App. D.C. 197, 334 F.2d 945 (1964); *Jones* v. *United States*, *supra*.

[12] In his Argument III appellant suggests that to consider as an adverse factor in sentencing that he continued to maintain innocence at the sentencing hearing infringes his rights under the Self-incrimination Clause of the Constitution ("No person . . . shall be compelled in any criminal case to be a witness against himself"). We do not think it apparent on the record that this was considered separately as an adverse factor by the court as was the factor that appellant lied on the stand at trial. In any event, that privilege, "the prerogative of a defendant not to take the stand in his own prosecution" (8 Wigmore, Evidence § 2251 (McNaughten rev. 1961) at 296), was waived in this case when appellant took the stand and testified. The words then spoken, if subject to an adverse construction against him because they were untruthful, can thereafter at any time be used against him. *Edmonds* v. *United States*, 106 U.S. App. D.C. 373, 377-78, 273 F.2d 108, 112-13 (1959), *cert. denied*, 362 U.S. 977 (1960). Moreover, appellant did not wish to be silent at the sentencing either but there volunteered that all he had said at trial was the truth. Clearly he was never compelled to

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JAMES E. KELLEY, JR.,
Assistant United States Attorneys.

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testify. The privilege, one to be silent, does not insulate appellant from the inference that what he does say is untruthful. Although a confession of guilt subsequent to trial may prejudice his chances on appeal or for an acquittal upon retrial, and so he has the right to continue to assert his innocence, the scope of that right does not permit him, in our view, to preclude the sentencing judge from concluding that the assertion of innocence is a lie. In short, if he chooses to speak, he has no constitutional right to lie.

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Reply Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,954

VINCENT E. SCOTT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Appeal From the United States District Court

For the District of Columbia

James L. McHugh, Jr.
John G. Kester
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

John L. Ingoldsby, Jr.
World Center Building
Washington, D. C. 20006

Attorneys for Appellant

TABLE OF CITATIONS

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,954

VINCENT E. SCOTT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

REPLY BRIEF FOR APPELLANT

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1. Appellant submits that by the concession that

> "a confession of guilt subsequent to trial may prejudice his chances on appeal or for acquittal upon retrial, and so he has the right to continue to assert his innocence" (Brief for Appellee, page 16, note 12),

the Government on this record has conceded all that is necessary to require vacating of the sentence in this case. The Government

apparently argues, nevertheless, that since Appellant spoke up at the sentencing hearing to reassert his innocence, the sentencing judge may impose a more severe sentence because, since the jury had already found him guilty and the judge agreed with the verdict, the assertion lacked credibility. (It would be a rare case in which such an assertion did not, since any defendant appearing for sentencing has ex hypothesi already been found guilty).

Thus, the Government urges a paradox, if not indeed a fiction: that a right to maintain innocence exists, but if the defendant avails himself of that right, his doing so can subject him to more severe punishment if his assertion is unconvincing -- as, in most cases, it will be.

The authorities are clear, however, that when constitutional rights are involved, such a Hobson's choice is intolerable. A defendant's right under the Fifth Amendment to maintain his innocence does not depend on whether he is believed. See United States v. Jackson, 390 U.S. 570 (1968). Such a constitutional right cannot be fettered by attaching a penalty to its exercise. As the Supreme Court has made clear: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to

exercise them, then it would be patently unconstitutional." United States v. Jackson, supra. Defendants seeking to exercise constitutional rights are not to be presented with a treacherous "choice . . . 'between the rock and the whirlpool.'" Garrity v. New Jersey, 385 U.S. 493, 498 (1967).

The Government's position has been squarely refuted by the Court of Appeals for the Fifth Circuit. On a record of sentencing which, like the present one, showed that the sentencing judge had imposed more severe punishment because the defendant maintained his innocence at the sentencing hearing, Judge Rivers for a unanimous court vacated the sentence, saying that:

> "When [the defendant] received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights." Thomas v. United States, 368 F.2d 941, 946 (5th Cir. 1966). (Footnote omitted).

Similarly, this Court has stated that a sentence following retrial may not be increased to penalize a defendant for exercising his right to appeal. Short v. United States, 120 U.S. App. D.C. 164, 167, 344 F.2d 550, 552 (D.C. Cir. 1965).

2. The record here shows clearly that the sentencing judge desired Appellant not only to refrain from further protesting his innocence, but also affirmatively to confess guilt at sentencing or earlier. The judge announced that he was taking into account Appellant's "attitude." (S.Tr. 10.) Indeed, the judge announced at the beginning of the hearing, before the letter was even brought up:

> "If you had pleaded guilty to this offense I might have been more lenient." (S.Tr. 5).

Contrary to the Government's apparent contention, such factors are not properly weighed in determining sentence, and it is well settled that if a judge sentences a defendant more severely simply because he elected to stand trial, the sentence is invalid. United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); Euziere v. United States, 249 F.2d 293 (10th Cir. 1957).

3. The Government urges that the attorney-client privilege should be narrowed so as not to apply to advice which an attorney gives to his client. The law is to the contrary. "By the weight of authority, the attorney's communications to the client are also within the privilege." Russell v. Second National Bank, 136 N.J.L. 270, 279, 55 A.2d 211, 217 (1947).

This is recognized in the very authorities which the Government cites. See 8 Wigmore, Evidence §2320 (McNaughton rev. 1961); McCormick, Evidence §93 (1954). It is true that some writers have argued, and some cases have held, that material evidence should not be withheld by a lawyer simply because he discussed it with his client. But the statements contained in the letter here were immaterial and irrelevant to the factors properly considered by a judge on sentencing; what is more, revealing them was obviously prejudicial to the Appellant. The letter contained advice and counsel from an attorney to his client which could not be made the subject of discovery in a civil action; it most certainly was equally privileged in a case where up to fifteen years of a client's life was at stake. As the Supreme Court held, in discussing the policy underlying this privilege, if such confidential documents could be ordered up for public review, "an attorney's thoughts, heretofore inviolate, would not be his own," and "the interests of the clients and the cause of justice would be poorly served." Hickman v. Taylor, 329 U.S. 495, 511 (1947).

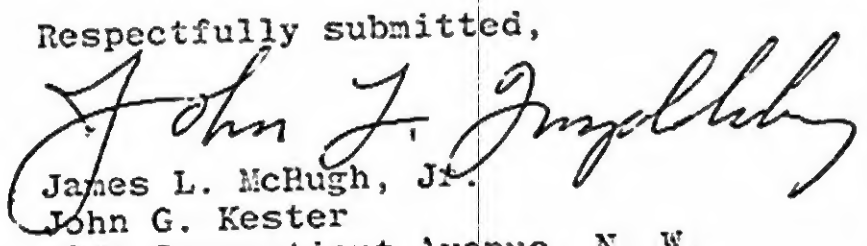
4. The Government argues that any privilege as to the letter was waived by Appellant. Assuming arguendo that he was the person who could waive the privilege, the record does not

show that any intelligent waiver by him was made. In the first place, it is obvious from the judge's colloquy with Appellant that Appellant had no idea what the privilege was or what he stood to lose by not claiming it. (See S.Tr. 13). Yet it is axiomatic that a waiver to be effective must be intelligently made. Also, timely objection was made by Appellant's counsel, who was Appellant's legally appointed representative; yet the judge nevertheless ignored the objection and continued to press Appellant directly, leaving Appellant to act without the opportunity of consulting counsel and at the insistence of the person about to sentence him. This effectively denied Appellant the benefit of counsel guaranteed by the Sixth Amendment. The most obvious proof that Appellant urgently needed the benefit of immediate advice from counsel was that he had produced the letter in court at all. Compare Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963).

CONCLUSION

Appellant renews his request that the judgment below be reversed and a new trial ordered: or, if such relief is not granted, that the sentence be vacated and the case be remanded for resentencing.

Respectfully submitted,



James L. McHugh, Jr.
John G. Kester
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036

John L. Ingoldsby, Jr.
World Center Building
Washington, D. C. 20006

Attorneys for Appellant

UNITED STATES COURT OF APPEALS
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VINCENT E. SCOTT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of July, 1968, sent a copy of the Reply Brief for Appellant in the above-entitled case by official United States mail to the attorney for appellee addressed as follows:

David G. Bress
United States Attorney
Frank Q. Nebeker
William H. Collins, Jr.
James E. Kelley, Jr.
Assistant United States Attorneys
United States Court House
Washington, D. C.

John L. Ingoldsby, Jr.